May 16, 2011

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: ***In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65 – Objection to Disclosure of Confidential and Highly Confidential Information to Dr. Lee L. Selwyn and Colin B. Weir**

Dear Ms. Dortch:

Pursuant to a Protective Order for the AT&T/T-Mobile USA proceeding,[1] AT&T Inc. ("AT&T"), Deutsche Telekom AG ("Deutsche Telekom"), and T-Mobile USA, Inc. ("T-Mobile"; collectively with AT&T and Deutsche Telekom, "Applicants") object to the Acknowledgments of Confidentiality ("Acknowledgments") filed in the above-referenced docket on behalf of Dr. Lee L. Selwyn and Colin B. Weir of Economics and Technology, Inc. (collectively, "ETI").[2] When Mr. Weir submitted the Acknowledgments, he failed to disclose ETI's client. On May 12, 2011, Mr. Weir supplemented the Acknowledgments and identified his client as one Butch Watson.[3] The identification of Mr. Watson ties ETI's Acknowledgments to those filed by several attorneys at Bursor & Fisher, P.A. (collectively with its individual lawyers, "Bursor Firm"), to which Applicants objected on May 12.[4] Accordingly, Applicants object to Dr. Selwyn's and Mr. Weir's Acknowledgments for the same reasons.[5]

ETI has teamed with the Bursor Firm in a number of class actions, and Mr. Watson has joined them in at least one suit. For instance, Mr. Weir was an expert witness, and his current client, Mr. Watson, was a lay witness in *Thomas v. Global Vision*

[1] *In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65, NRUF/LNP Protective Order, DA 11-711 (WTB rel. Apr. 18, 2011) ("*Protective Order*").

[2] *See* Letter from Colin B. Weir, Vice President, Economics and Technology, Inc., to Marlene H. Dortch, Secretary, FCC (May 6, 2011).

[3] *See* Letter from Colin B. Weir, Economics and Technology, Inc., to Marlene H. Dortch, Secretary, FCC (May 12, 2011).

[4] *See* Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 12, 2011) (Exhibit A, "Bursor Objection").

[5] Applicants hereby incorporate by reference the Bursor Objection.

Products, Inc.,[6] a false advertising class action involving a hair-regrowth product.[7] Likewise, Dr. Selwyn was an expert for Mr. Bursor's plaintiffs in California state court litigation consolidating numerous actions Mr. Bursor and others brought against wireless carriers including AT&T.[8] Curiously, Dr. Selwyn, in his expert role, also apparently retained Mr. Bursor as counsel in connection with that proceeding.[9] Given the paucity of information supplied by ETI and the Bursor Firm about their interests in this proceeding, Applicants cannot be certain that ETI is working with the Bursor Firm in this case, but these past close working relationships cannot be ignored.

Applicants objected to the Acknowledgments filed by the Bursor Firm because it is actively litigating unrelated class actions against AT&T.[10] Thus, we wrote, "[p]roviding them access to confidential and highly confidential information in this proceeding raises precisely the same risks as providing access to counsel engaged in Competitive Decision-Making."[11] In light of the close ties among ETI; its client, Mr. Watson; and the Bursor Firm, ETI's Acknowledgments suffer from the very same defect. Dr. Selwyn and Mr. Weir, no less than the Bursor Firm lawyers, will be unable to forget what they learn or "split their brains in two" to keep the confidential and highly confidential information to which they seek access from being used unfairly to the detriment of Applicants and other carriers.

Applicants welcome meaningful public participation in this proceeding and do not submit objections lightly. To date, Applicants have cleared 70 Outside Counsel (including non-attorney staff) and 24 Outside Consultants, collectively representing 22 parties, for access to confidential or highly confidential information. Applicants have filed objections only in three cases where they clearly have been warranted: the Bursor Firm, ETI, and three management consultants from PRTM Management Consultants.[12]

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[6] No. RG03091195 (Cal. Super. Ct. verdict Nov. 20, 2009).

[7] *See* Courtroom Video Network, Thomas v. Global Vision Products, http://www.courtroomview.com/proceedings/thomas-v-global-vision-products-inc-avacor-trial-2009-10-19 (last visited May 15, 2011) (listing counsel and experts).

[8] *See, e.g.*, *In re Cellular Termination Fee Cases*, No. J.C.C.P. 4332, Partial Tentative Ruling on In Limine Motions (Cal. Super. Ct. June 13, 2007) (Exhibit B).

[9] *See id.*

[10] Bursor Objection.

[11] *Id.* at 1. Undefined capitalized terms have the meanings supplied in the *Protective Order*.

[12] *See* Letter from Peter J. Schildkraut, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (May 11, 2011) (objecting to the PRTM management consultants).

For these reasons, the Commission should dismiss or deny the Acknowledgments of Confidentiality submitted by ETI.

Respectfully submitted,

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cc: Attached Service List

EXHIBIT A

May 12, 2011

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: ***In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65 – Objection to Disclosure of Confidential and Highly Confidential Information to Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot**

Dear Ms. Dortch:

Pursuant to a Protective Order for the AT&T/T-Mobile USA proceeding,[1] AT&T Inc. ("AT&T"), Deutsche Telekom AG ("Deutsche Telekom"), and T-Mobile USA, Inc. ("T-Mobile"; collectively with AT&T and Deutsche Telekom, "Applicants") object to the Acknowledgments of Confidentiality ("Acknowledgments") filed in the above-referenced docket on May 9, 2011 on behalf of Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot from the law firm of Bursor & Fisher, P.A. (collectively, "Bursor Firm").[2] The Bursor Firm is actively litigating unrelated class actions against AT&T.[3] Providing them access to confidential and highly confidential information in this proceeding raises precisely the same risks as providing access to counsel engaged in Competitive Decision-Making.[4] Accordingly, Applicants object to their Acknowledgments.

[1] *In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65, NRUF/LNP Protective Order, DA 11-711 (WTB rel. Apr. 18, 2011) ("*Protective Order*").

[2] *See* Letter from Joseph I. Marchese, Bursor & Fisher, P.A., to Marlene H. Dortch, Esq. (May 9, 2011).

[3] *E.g.*, *Hendricks v. AT&T Mobility*, No. C11-00409 (N.D. Cal. filed Jan. 27, 2011) (putative class action alleging artificial inflation of data usage and charges); *Thein v. AT&T Mobility*, No. SACV10-01796 (C.D. Cal. filed Nov. 22, 2010) (putative class action alleging artificial inflation of data usage and charges); *Cook v. AT&T Mobility*, No. CV10-08870 (C.D. Cal. filed Nov. 18, 2010) (putative class action alleging artificial inflation of data usage and charges).

[4] Undefined capitalized terms have the meanings supplied in the *Protective Order*.

Mr. Bursor has run a highly successful business filing class action lawsuits against AT&T, T-Mobile, and other wireless carriers over the past few years. The following are among the cases he has litigated:

- Mr. Bursor and his co-counsel garnered a $5.7 million attorneys' fee as part of the settlement in *Mendoza v. Cingular Wireless LLC*.[5]

- "Mr. Bursor negotiated and obtained court-approval for a nationwide class action settlement in *Nguyen v. T-Mobile USA, Inc. . . .*"[6]

- "Ayyad v. Sprint Spectrum L.P. Mr. Bursor was the lead trial lawyer representing a class of approximately 1.9 million California consumers who were charged an early termination fee under a Sprint cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. After a five-week combined bench-and-jury trial, the jury returned a verdict in June 2008 and the Court issued a Statement of Decision in December 2008 awarding the plaintiffs more than $299 million. Sprint's appeal from this trial is pending."[7]

- "White v. Cellco Partnership d/b/a Verizon Wireless. Mr. Bursor was the lead trial lawyer representing a class of approximatlely [*sic*] 1.4 million California consumers who were charged an early termination fee under a Verizon cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. In July 2008, after Mr. Bursor presented plaintiffs [*sic*] case-in-chief, rested, then cross-examined Verizon's principal trial witness, Verizon agreed to settle the case for a $21 million cash payment and agreed to an injunction restricting Verizon's ability to impose early termination fees in future subscriber agreements."[8]

So far as we are aware, Mr. Bursor previously has not participated as counsel in any FCC proceeding for approval of a merger or acquisition. Indeed, in the last decade, Mr. Bursor or his firm appear to have participated only in three declaratory ruling proceedings before the Commission.[9] Each was related to litigation Mr. Bursor had pending before the courts.

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[5] No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted).

[6] Recent Cases, http://www.bursor.com/cases.php (last visited May 12, 2011).

[7] Trial Results, http://www.bursor.com/trialresults.php (last visited May 12, 2011).

[8] *Id.*

[9] *See In re BellSouth's Request for Declaratory Ruling the State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Dkt

Footnote continued on next page

Having heretofore had no interest in FCC transfer of control or assignment proceedings, Mr. Bursor and his colleagues have now filed Acknowledgments of Confidentiality seeking access to highly confidential information in the record of this proceeding. This was a noteworthy occurrence. Counsel for Applicants recall no other instance in the numerous transactions in which they have participated where a class action lawyer, representing individuals, has sought access to confidential or highly confidential information in the record.

Upon inquiry from counsel for AT&T as to what party to this proceeding had retained him, Mr. Bursor said that he had been retained by dozens of AT&T and T-Mobile customers to help them determine whether they wish to participate in this proceeding. He identified one – Astrid Mendoza, a named plaintiff in two previous class actions Mr. Bursor had filed against AT&T.[10] The sudden appearance of a class action lawyer – with no prior involvement in FCC merger or acquisition proceedings and representing largely unnamed individuals with no apparent private interest to motivate them to pay counsel to oppose this transaction – raises concerns about how the confidential and highly confidential information in the docket will be used.

The *Protective Order* is designed to address those concerns. It bars counsel whose "activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship" with Applicants from obtaining access to highly confidential information in this proceeding.[11] Such counsel have the incentive and ability to take the information they learn in this proceeding and apply it to the business decisions their clients make. And the risk of competitive harm is sufficiently great that the Commission has concluded that it is unreasonable to depend on their efforts to keep what they have learned from influencing the business decisions with which they are involved. Thus, the Commission denies

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Footnote continued from previous page
No. 03-251; *In re SunCom Wireless Operating Company, L.L.C. Petition for Declaratory Ruling and Debra Edwards Opposition and Cross Petition for Declaratory Ruling Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A),* WT Dkt No. 05-193; *In re CTIA Request for Declaratory Ruling Seeking Determination of Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A),* WT Dkt No. 05-194. These three proceedings were the only ones found in a search of the Commission's Electronic Comment Filing System for filings received on or after May 10, 2000 with "Bursor" in the Name of Filer, Lawfirm Name, or Attorney/Author Name fields.

[10] *Mendoza v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted); *Ayyad v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. filed Feb. 11, 2004) (including Ms. Mendoza as a class representative).

[11] *Protective Order* ¶¶ 3-4.

access to confidential and highly confidential information to such counsel to keep them from giving their clients an unfair advantage at the expense of Applicants, other carriers, and the public interest in fair competition.

The Bursor Firm stands in just such a position relative to AT&T and other wireless carriers. With a steady stream of litigation against AT&T and other members of the industry, the Bursor Firm will have the incentive and ability to use the information they learn in this proceeding in those other cases. And it is equally unreasonable to expect that they will be able to forget what they learn or "split their brains in two" to keep the confidential and highly confidential information from being used unfairly to the detriment of Applicants and other carriers.

For these reasons, the Commission should dismiss or deny the Acknowledgments of Confidentiality submitted by the Bursor Firm.

Respectfully submitted,

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cc: Attached Service List

CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of May, 2011, I caused true and correct copies of the foregoing to be served by electronic mail upon:

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EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In Re:

Cellular Termination Fee Cases

Judicial Council Coordination
Proceeding No. 4332

Partial Tentative Rulings
On In Limine Motions

The Court provides the following tentative rulings to assist counsel in preparing for and framing their arguments on June 15, 2007. The Court will assume that all rulings are contested except those specifically identified by counsel as uncontested. Kindly provide information on any uncontested matters by 4:00 p.m. on June 14, 2007.

PLAINTIFFS' IN LIMINE MOTIONS

Motion To Preclude Class Member Testimony

Plaintiffs' motion to preclude testimony of individual class members is DENIED. There is no basis in the Court's prior orders, the law, or logic to preclude testimony intended to test the credibility of the common proof of materiality or lack thereof offered by the parties. If the extent of individual testimony offered by plaintiffs becomes so great as to undercut their assertions in support of class certification that common issues predominate over individual issues, or if it appears that the case will become unmanageable, then the Court may have to revisit its class certification order. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809-810.; *Green v. Obledo* (1981) 29 Cal. 3d 126, 148; *Walsh v. Ikon* (2007) 148 Cal. App. 4th 1440, 1451. *See also* Class Cert. Order, May 25, 2006 at 20:13-18 ("Prior to trial, Plaintiffs' counsel will be required to present the Court with their plan of how the case can proceed to

trial in a manner that will protect the due process rights of Defendant and the absent class members, be comprehensible to the jurors, and respect the time of the jurors. The burden rests with Plaintiffs to present a manageable trial plan. *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 924-925.")

However, Judge Bonnie Sabraw has anticipated the possible need for limited additional class member depositions. Order, March 16, 2007 at 12:17-19. The Court believes that Plaintiffs should confine their additional discovery efforts and designations of witnesses for trial to the scope of that order.

MIL A

Plaintiffs' motion to prevent Sprint from making evidentiary use of Judge Cote's opinion is GRANTED. There will be no reference to that opinion in the presence of the jury.

MIL B

Granted as unopposed.

MIL C

Denied. Subject to appropriate foundation,Sprint may use Exhibit 798 consistently with Evidence Code §780. Such use is not prohibited by Evidence Code §§1152, 1154. The probative value of the proposed evidence does not outweigh its relevance.

MIL D

Granted. Evidence Code §352.

MIL E

Granted in part. To the extent that a proper foundation is established that an expert has properly relied upon one of these reports for his or her opinion, reference to the report may be made without disclosing its contents on direct examination. The reports themselves are not admissible under Evidence Code §1280 and §352. *See People v. Coleman* (1985) 38 Cal. 3d 69, 92; Simons, California Edidence Manual (2007) §4.31 at 294-95.

MIL F

Granted as unopposed.

MIL G

Granted as unopposed.

MIL H

Granted in part. Exhibits 843 and 844 are excluded. Subject to establishing a proper foundation, Exhibits 841 and 842 may be admissible.

MIL I

Granted as unopposed.

MIL J

Denied for the reasons stated above regarding class member testimony.

MIL K

Denied. Selwyn's changes in his testimony and the manner in which they came about are admissible. Evidence Code §780(h).

MIL L

Granted as unopposed.

MIL M

Deferred pending the parties' continuing meet and confer efforts.

SPRINT'S IN LIMINE MOTIONS

MIL No. 1

Sprint's motion in limine number 1 seeks to preclude Dr. Michael Dennis and Dr. Lee Selwyn from testifying at trial based upon their refusal to answer some questions at their recent depositions. If the motion were granted, there would be no classwide evidence of harm to the plaintiff class, an essential element of plaintiffs' claims under the Unfair Competition Act and the Consumer Legal Remedies Act. *Colgan v. Leatherman Tool Group, Inc.*, (2006) 135 Cal. App. 4th 663. Nor would there be any evidence of damages.

Both of these experts provided declarations in opposition to Sprint's motion for summary judgment or summary adjudication. Both were deposed in 2006, Selwyn in the ETF litigation and Dennis in this case. The transcripts of those depositions indicate that Plaintiffs' counsel played a significant role in the creation of Selwyn's declaration and sought to shape both witnesses' deposition testimony through speaking objections and coaching during recesses.

Sprint's motion to strike the declaration of Dennis in opposition to the summary judgment motion was denied. Judge Ronald Sabraw wote: "The Court has considered the Declaration of Dr. Dennis. The trier of fact can evaluate what weight to give to Dr. Dennis'

Declaration or testimony at trial." The motion as to Selwyn was implicitly overruled. However, Judge Sabraw also made clear that "the Court's consideration of the evidence is limited to this motion only and is not to be construed as an indication of the admissibility in future motions or at trial."[1]

When the depositions of Selwyn and Dennis were resumed in April and May 2007, respectively, Plaintiffs' counsel instructed both witnesses not to answer questions pertaining to their recent communications with the experts. Sprint states (without evidence) that as a result of the assertions of privilege at the Selwyn deposition, a teleconference was arranged with Judge B. Sabraw to raise the issue. Sprint asserts that "during the teleconference, Judge Sabraw stated that the court would not instruct Dr. Selwyn to answer questions over the assertion of privilege, but cautioned that the assertion of the privilege could impact Dr. Selwyn's ability to testify at trial." MIL No. 1 at 3:14-16. Plaintiffs do not dispute that the teleconference took place as described.

Plaintiffs' consolidated memorandum in opposition to Sprint's in limine motions argues with respect to Selwyn and Dennis that they were entitled to be represented by counsel in connection with the resumption of their depositions. They also rely on Evidence Code §913 (a) for the propositions that neither counsel nor the court may comment on a party's invocation of the attorney client privilege and "the trier of fact may not draw any inference therefrom . . . ."

The Court agrees with Plaintiffs that each expert witness had a right to be represented by counsel in connection with his subpoened deposition. If all else is equal, the witness may be represented by counsel of his choice. But all else is not equal when the attorney for a party undertakes a joint representation of his existing class clients and the "independent" experts who will testify for them at trial.

The Court is not aware of any precedent in published decisions or professional literature which would permit a party to shield an expert witness from thorough examination on the extent to which counsel's communications have influenced his testimony by purporting to create a dual representation of party and witness, coupled with instructions not to answer to

[1] After Judge Ronald Sabraw retired, responsibility for coordination of this complex case and other cell phone cases was assigned to the Honorable Bonnie Sabraw. On March 16, 2007, she granted a motion to reconsider a portion of the January 12, 2007 order. However, the issue of the admissibility of the expert's declarations was not a part of her reconsideration at that time.

the expert based upon the privilege.[2] The Court is aware, however, of *Steiny & Co. v. California Electric Supply Co.*, (2000) 79 Cal. App. 4th 285. In that case the court of appeal affirmed a judgment for defendant entered after the trial court precluded plaintiff from submitting evidence of damages. During discovery, plaintiff had sought and obtained a protective order preventing defendant from learning the basis of its damages calculation based upon the trade secret privilege. Nonetheless, the court granted defendant's motion in limine. The court of appeal affirmed the judgment for defendant, holding:

> Where privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed. . . .
>
> . . . .
>
> [Appellants] had the right to stand on the privilege, but not the right to proceed with their claim while at the same time insisting on withholding key evidence from their adversary.

79 Cal. App. 4th at 292.

Plaintiffs argue that nothing of consequence was said in the protected communications before and during the resumed depositions. Sprint raises legitimate concerns about the validity of that assertion both based upon the coaching reflected in the record of the first sessions of the depositions and, with respect to Selwyn, to the complete change of his testimony in the post-deposition "corrections" submitted after completion of his April 17, 2007 deposition. At the deposition Selwyn testified:

> If the customer upon acquiring a handset from a Sprint store had an understanding that that handset would only – could only be activated on the Sprint Network and had no expectation that it could be activated on another network, as to that customer, that specific customer would not have suffered a diminution in value.

06/01/2007 Fazio Declaration, Exh. A, 134:6-10.

> If all of those facts were disclosed to the customer and a purchase transaction were nevertheless completed, I think that customer would not suffer any diminution of value, as to that customer.

Id. at 138:13-17.

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[2] If an attorney client relationship was created between Scott Bursor and the two experts, California law required Mr. Bursor to obtain informed written consent from both clients to the potential conflict of interest inherent in his joint representation of them. Rule 3-310(C), California Rules of Professional Conduct. Although Mr. Bursor is not a member of the California bar, he is "subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California." Rule 9.40(f), California Rules of Court.

Q. So the customer's suffering a diminution in value turns on the customer's expectations at the time of purchase?

MR. BURSOR: Object to form. Vague. Ambiguous.

A. That's certainly a factor, yes.

Id. at 142:5-10.

This testimony is important to the case because Plaintiffs' standing, that is, their contention that they suffered economic harm, as well as the amount of restitution they seek under the UCL, and damages under the CLRA, depend upon their theory of diminution of value. If there was no diminution of value there is no evidence of injury or damages. And if each purchaser's expectations at the time of purchase must be understood in order to assess whether there was a diminution of value for him or her, then Plaintiffs' assertion that common questions of law and fact predominate, which was essential to Judge R. Sabraw's decision to certify the class, are called into question. Yet on May 17, 2007, Selwyn "corrected" his testimony without explanation to delete the first two of those answers and to substitute in their place "No, that is incorrect" and "I guess my answer to that would be no." Fazio Declaration, Exh. R. Given Plaintiffs' assertion of the privilege with respect to questions pertaining to the April 2007 deposition Sprint would be precluded from inquiring into communications with counsel which may account for this reversal. Moreover, if Plaintiffs persist in claiming an attorney client relationship with their experts, Sprint would be precluded from examining further communications between counsel and the experts in preparation for and during trial.

On this record, at a minimum, Sprint should not have to rely upon statements by the experts whose testimony goes to the heart of Plaintiffs' case or their attorneys about how inconsequential their shielded communications may have been. Indeed, the Court is inclined to grant Sprint's motion in limine number one because of the manifest unfairness to Sprint of permitting Plaintiffs to shield their counsel's communications with experts and thus deprive Sprint of its ability to examine a key area of bias, as well as the nature and thoroughness of the preparation of the experts' testimony.

The Court will entertain argument from counsel for Plaintiffs on why such a ruling would be improper, and whether such a ruling is necessary to preserve Sprint's right to a fair trial. The Court is mindful of the fact that both experts did most of their work on this case long before the formation of an attorney client relationship with counsel and that their testimony had previously been given in the form of declarations and depositions unshielded by any privilege. If they wish, Plaintiffs can propose methods short of preclusion that would maintain the integrity of the trial process and Sprint's right to a fair trial. Sprint may, of course, comment on why any such measures are inadequate under the circumstances.

MILs Nos. 2 – 4

Quite apart from the issue raised in MIL No. 1,Sprint asks that the testimony of Dennis and Selwyn be excluded on a variety of different grounds including lack of relevance to this case and improper methodology. Plaintiffs have elected to respond to these motions in a consolidated manner, and the Court will do the same.

With respect to the Dennis testimony and studies, quite apart from potential technical flaws in the original Dennis survey which go to the weight rather than the admissibility of the evidence, the Court has two principal concerns regarding its admissibility. Initially, Dennis' report acknowledges that his survey was designed as a hypothetical choice exercise, "holding every element of the transaction constant except for price and the lock attribute." Yet he acknowledges that "retail purchases of cell phones often involve service contracts, calling plans and a myriad of other services, fees, and charges . . . ." Pl. Trial Exh. 234 at 6; 05/16/2007 Depo. 313:18-314:12, Exh. B to Fazio Declaration. He hasn't been asked to opine on what appropriate uses of his $55 contingent valuation conclusion would be, or as to whether it would be a fair use of his survey to use it in calculating damages in this case. 11/17/2006 Depo. 39:12-40:-42:11, Exh. T to Fazio Declaration. Although construction of a survey instrument that could replicate a customer's real world choices may have been difficult or even impossible, the Court is not convinced that the hypothetical study measures the alleged harm or damages caused by the alleged fraudulent and unfair practice. If it does not, then it has no relevance and should not be admitted.

Sprint cites *Colgan v. Leatherman Tool Group, Inc.*, (2006) 135 Cal. App. 4th 663 as an accurate statement of the law with respect to the need for substantial evidence of injury to support an award of restitution under the UCL and restitution or damages under the CRLA.

Plaintiffs make no effort to respond to this case.[3] *Colgan* is particularly interesting since the court affirmed the trial court's order granting a consumer class summary adjudication on defendant's liability under the UCL, the CRLA, and the false advertising law, but reversed an award of some $13 million in restitution. The court reviewed several leading cases under the UCL and CRLA (as well as Bus. & Prof. Code §17500) and held:

> From the authorities we conclude that restitution under the statutes involved here must be a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by the evidence.

135 Cal.App. 4th at 698.

Plaintiffs here have not begun to explain how the Dennis study meets the requirement of assessing and measuring the "amount to restore to the plaintiff what has been acquired by violations of the statutes." In the absence of a persuasive explanation, the study appears to be inadmissible.

It is no answer to argue, as Plaintiffs do, that Judge R. Sabraw has already decided the admissibility of this type of evidence in his order granting class certification and his order denying Sprint's motion for summary judgment or summary adjudication. Clearly he has not. Judge Sabraw made clear in both orders that his rulings on admissibility of evidence at those stages would have no bearing on admissibility for later motions or at trial. 05/25/2006 Order at 18:25-27; 01/12/2007 Order at 11:8-10. Indeed, the Dennis study did not exist at the time of the class certification order. Moreover, in that order, he took pains to make clear in a section entitled "ISSUES NOT DECIDED" that:

> Although the parties have addressed these merits issues in the context of class certification, the Court expressly declines to decide (1) whether Sprint had a duty to disclose the handset locks to consumers, (2) whether Sprint's alleged failure to disclose the handset locks would have been material to consumers, (3) whether for purposes of the UCL's standing requirement, Plaintiffs' receipt of a handset with "diminished value" is "loss of money or property," (4) whether under the UCL the Court has the ability to restore to the Plaintiffs the alleged "diminished value" of locked handsets, and (5) whether the "diminished value" of locked handsets is a quantifiable and non-speculative amount that can be restored to consumers.

05/25/2006 Order at 4:3-13.

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[3] In submitting their 38 page consolidated memorandum in opposition to Sprint's motions in limine and their 29 page consolidated memorandum in support of their own motions in limine Plaintiffs have failed to comply with Rule 3.1113(f), California Rules of Court by omitting tables of authorities. Such tables are easily generated by computer and very useful for the Court.

Further, Dennis has not been prepared to testify that the results of his October 2006 survey can be generalized to the entire class period dating back to 1999. Fazio Exh. B at 294:6-295:15. Since Plaintiffs intend to use the survey to establish injury and to measure restitution and damages over the entire class period, a better foundation would be necessary for such use of the survey. Yet, at least as of his deposition on May 16, 2007, Dennis did not "have any expert opinion or evidence that I could point to to validate that."

The Court is aware that Dennis has completed a more recent California survey and that he apparently has yet to provide his deposition as a trial expert. Based upon the current record, however, and subject to the final resolution of Sprint's MIL No. 1, the Court would not be inclined to allow Dennis to testify at trial.

Selwyn's testimony is wholly dependent upon Dennis' study as a foundation for his calculation of damages. While economists often rely upon other experts' work for assumptions which permit them to calculate damages, in the absence of an evidentiary basis for the assumptions, no economic opinion is meaningful. Further, far from bolstering Dennis' methodology, Selwyn's uncorrected deposition testimony brings it into substantial question. Consequently, on this state of the record the Court would not be inclined to allow Selwyn to testify at trial.

MIL No. 5

Sprint's motion to exclude the testimony of Robert Zicker is DENIED. Sprint relies upon the same kind of coaching in the preparation of Zicker's declarations and at his depositions as is the subject of its motion number 1. The critical difference, however, is that at no time has Zicker become a client of Plaintiffs' counsel and refused to answer questions based upon the attorney client privilege.

Sprint's reliance upon Code of Civil Procedure §128.6 is completely erroneous. That section has never become effective since §128.7 was indefinitely extended by the Legislature in 2005. 2005 ch. 706 (AB 1742) §9. Moreover, that non-effective law is directed toward financial sanctions, not evidence preclusion sanctions.

Code of Civil Procedure §2023.010(d), (e) and (f), and 2023.030(c) do authorize evidence preclusion sanctions for discovery abuse of the type disclosed in the deposition excerpts submitted to the Court on this motion. The Court does not condone Mr. Bursor's

behavior in this regard. However, the law is clear that such sanctions are to be imposed as a last resort after orders compelling discovery have been disregarded. *See, e.g.*, Weil & Brown, *Civil Procedure Before Trial* (The Rutter Group 2006) §8:863 at 8E-151. The record does not disclose that Sprint has sought any order with respect to this conduct prior to this motion in limine.

However, as described by Sprint, Plaintiffs' proposed use of Zicker's opinions at trial is sufficiently questionable that the Court will require an appropriate foundation to be laid before Zicker may offer any opinions at trial. Subject to the manner in which Sprint's other in limine motions are resolved, it may be appropriate to schedule a hearing on Zicker's testimony pursuant to Evidence Code §408.

[Rulings on MILs 6 – 12 deferred]

Recognizing that Plaintiffs do not oppose Sprint's in limine motions 10 and 11, in the interests of providing the parties with advance notice of the Court's current thinking, this draft order will be provided to counsel on June 13, 2007. The Court will endeavor to provide a draft order on the remaining issues in advance of the hearing at 9:00 a.m. on June 15, 2007.

Dated: June 13, 2007

Steven A. Brick
Judge of the Superior Court

CERTIFICATE OF SERVICE

I hereby certify that on this sixteenth day of May, 2011, I caused true and correct copies of the foregoing to be served by electronic mail upon:

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